FILED
NOV 16 1925
WM. R. STANSBURY
CLERK

Supreme Court of the United States

NO. 323.

OCTOBER TERM, 1925.

CINCINNATI, INDIANAPOLIS & WESTERN RAILROAD COMPANY,
Appellant,

v.

INDIANAPOLIS UNION RAILWAY COMPANY, THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY, AND THE PITTSBURGH, CINCINNATI, CHICAGO & ST. LOUIS RAILWAY COMPANY,
Appellees.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

BRIEF OF APPELLEES.

JOSEPH S. GRAYDON,
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JOSEPH J. DANIELS,
Counsel for Appellees.

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The two opinions delivered in the court below in the instant case are not reported. They are found at R., 33-42 and R., 45-49.

In the prior litigation between the parties, the opinions delivered in the District Court are not reported. They are found at R., 66-73, R., 84-86, and R., 100-101. The opinion of the Circuit Court of Appeals for the Sixth Circuit in the prior litigation is found in Cincinnati, Indianapolis and Western Railroad Co. v. Indianapolis Union Railway Co., et al., 279 Fed. 356 (R., 109-118). The denial of the writ of certiorari by the Supreme Court in the prior litigation is found in Cincinnati, Indianapolis and Western Railroad Company v. Indianapolis Union Railway Company, et al., 258 U. S. 629.

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INDIANAPOLIS UNION RAILWAY
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STATEMENT OF THE CASE.

The single question before this court for decision is whether or not the District Court had jurisdiction to entertain appellant's petition, filed July 2, 1924; but a proper understanding of that question requires some knowledge of the history of the relations between the parties and of the prior litigation between the appellant and the appellees. The appellant's statement of these matters in its brief, under the head-

ing "Statement of the Case," is believed by appellees to be not sufficiently full; and therefore we give our own statement thereof below.

Situation of the Parties and their Predecessors Prior to Appellant's Purchase at Foreclosure Sale in the District Court (1883-1915).

The Indianapolis Union Railway Company is an Indiana corporation. It owns and operates the union depot and the union tracks at Indianapolis; it holds under 999 year lease, and operates, the belt railroad at Indianapolis (R., 53-54 and 109). Until 1883, the union depot and the union tracks were owned by certain of the railroads entering the city (the predecessors of the appellee, The Cleveland, Cincinnati, Chicago and St. Louis Railway Company, and of the appellee, The Pittsburgh, Cincinnati, Chicago and St. Louis Railway Company, which last-named two companies, and their predecessors, are known as the "proprietary companies"). On September 20, 1883, an agreement (R., 55-60 and 109-110) was made between the proprietary companies. It provided, in brief, that the proprietary companies should convey the union depot and union tracks to the Indianapolis Union Railway Company; that the latter company should acquire certain additional lands and should erect, on the real estate so conveyed to it and on such additional lands, a new union depot and additional union tracks; that the Indianapolis Union Railway Company should be paid by the companies using its facilities, including the proprietary companies, a "fixed rental" equal to seven per cent per annum upon the then appraised value of its depot, tracks and belt line and upon the cost of all additions and betterments thereafter made, said fixed rental to be "from time to time divided into as many equal shares as there are railroad companies using said property, and each company so using the same" to

"pay one of said shares" and no abatement to be made from any user's share of said fixed rental "by reason of such company not using either the union passenger depot or the Belt Railway"; that the expenses of operation should be paid by the several users of the properties "in proportion to such use, on the basis of wheelage"; that seven named non-proprietary companies were to be admitted to the "joint use" of the terminal facilities upon their respectively signing and sealing a copy of the agreement but were not to become thereby members or owners of the Indianapolis Union Railway Company; that the right of use of all signatories was to be perpetual; and that, in view of the fact that the large prospective outlay for new facilities was to be made mainly in the interests of the non-proprietors, said non-proprietors bound themselves "to forever continue in the joint use aforesaid."

The appellant's two original predecessor companies, the Indianapolis, Decatur & Springfield Railway Company (running west from Indianapolis) and the Cincinnati, Hamilton and Indianapolis Railroad Company (running east from Indianapolis) were among the seven non-proprietary companies who accepted and signed said agreement of September 20, 1883. (R. 60 and 110-111.) In 1902 the Indiana, Decatur and Western Railway Company (successor of the Indianapolis, Decatur and Springfield Railway Company) and the Cincinnati, Hamilton and Indianapolis Railroad Company were consolidated into the Cincinnati, Indianapolis and Western Railway Company (R. 63 and 111). Prior to the consolidation, the two lines respectively east and west of Indianapolis each paid one full share of fixed rental to the Indianapolis Union Railway Company; and after the consolidation in 1902, the consolidated company (and its receivers appointed in the foreclosure suits hereinafter referred to, in the District Court below) paid to the Indianapolis Union Railway Company two shares of said fixed rental, one by virtue of the original con-

tract of the Indianapolis, Decatur and Springfield Railway Company and the other by virtue of the original contract of the Cincinnati, Hamilton and Indianapolis Railroad Company (R. 63 and 111).

APPELLANT BECOMES PURCHASER AT FORECLOSURE SALE IN THE DISTRICT COURT (1915).

Foreclosures of the first and refunding mortgage of the consolidated company (the Cincinnati, Indianapolis and Western Railway Company) and of the prior lien mortgage of the Indiana, Decatur and Western Railway Company were had in two suits in the District Court below, and the railroad property of the Cincinnati, Indianapolis and Western Railway Company was sold to a purchasing committee which assigned its purchase to the newly organized Cincinnati, Indianapolis and Western Railroad Company, the appellant in the case at bar. The sale was confirmed by the court and the Master conveyed the property to the appellant on November 30, 1915 (R. 111). In each foreclosure case, among the items of property sold and conveyed to appellant, was "contract dated September 20, 1883, and amendment of August 30, 1906, under which tracks of the Union Railway Company are occupied in Indianapolis" (R. 111). Each foreclosure decree provided that the purchaser, or his assignee, should have the right, for a period of 30 days after delivery of the Master's deed, "to elect whether or not to assume or adopt any lease or contract made by the defendant Consolidated Company (the Cincinnati, Indianapolis and Western Railway Company) or its predecessors in title;" and that such purchaser or his assignee should "be held not to have adopted or assumed any such lease or contract in respect of which he or they shall have filed a written election not to assume or adopt the same with the Clerk of this court within said period of thirty days" (R. 23 and 111-112).

On December 24, 1915, the appellant, assuming to act under the authority of the foregoing provision, attempted to reject its liability for one share of the fixed rental payable to the Indianapolis Union Railway Company by filing in each foreclosure case a so-called election "not to assume or adopt * * * the * * * contract dated September 20, 1883, and the amendment of August 20, 1906, under which tracks of the Union Railway Company are occupied at Indianapolis, in so far as such rights are conferred by the signature of the Indianapolis, Decatur and Springfield Railway Company to said contract. This assignee hereby expressly accepts such contract as made with the Cincinnati, Hamilton and Indianapolis Railroad Company and desires to accept the benefits of the contract with said company and the right to occupy the tracks of the Union Railway Company and the Indianapolis Belt Railway Company, therein conferred" (R. 112). Thereupon appellant took the position that it could exercise all of the rights of its predecessor by paying to the Indianapolis Union Railway company only one share of said fixed rental, instead of the two shares which its predecessor and that predecessor's predecessors had always paid.

Entry of Appellees into the Foreclosure Suits for Purpose of Preventing Appellant's Attempted Avoidance of the Obligations of its Purchased Contract, and Termination of the Resulting Litigation in Favor of Appellees (October 24, 1916—May 1, 1922).

The Indianapolis Union Railway Company and its then three proprietary companies then filed in the foreclosure suits in the District Court below their petition (R. 53-65) asking that the Cincinnati, Indianapolis and Western Railroad Company (appellant in the case at bar) be required to show cause

why it should not be ordered to pay to the Indianapolis Union Railway Company the full amount that would have been payable by the Cincinnati, Indianapolis and Western Railway Company if said last named company "had continued in the use and enjoyment of the railroad property, rights and privileges described in and ordered to be sold" by the decrees of foreclosure and sale, and praying for other and further relief. Appellant (defendant in that petition) moved to dismiss the petition for lack of jurisdiction and want of equity (R. 66). Its motion was overruled (R. 73). Appellant then answered the petition on the merits (R. 73-83). The motion of the petitioners in the petition to strike out all the alleged defences in the answer was sustained (R. 86-88). Appellant then moved for leave to file an amended and supplemental answer (R. 88). The court overruled the motion, (R. 101) and entered an order denying appellant's asserted right to reject its liability for one share of said fixed rental while at the same time making the full use of the facilities of the Indianapolis Union Railway Company which its predecessor had made, and holding appellant liable to pay two shares of said fixed rental (R. 101-103). The cause was then referred to a Master, who stated the amount of appellant's liability to the Indianapolis Union Railway Company. The court confirmed the Master's report (R. 103-104). The Cincinnati, Indianapolis and Western Railroad Company appealed to the Circuit Court of Appeals, which court, in its opinion handed down February 7, 1922 (R. 109-118), affirmed the decree of the District Court. The opinion of the Circuit Court of Appeals is in 279 Fed. 356. The Cincinnati, Indianapolis and Western Railroad Company then petitioned this court for a writ of certiorari, which was denied on May 1, 1922 (258 U. S. 629).

From May 1, 1922, forward, the Cincinnati, Indianapolis and Western Railroad Company continued to use the terminal

facilities of the Indianapolis Union Railway Company and paid two shares of said fixed rental therefor (R. 35).

Attempt of Appellant, by Petition Filed in the Foreclosure Cases July 2, 1924, to Rescind Contract of 1883 with Indianapolis Union Railway Company, on Which Contract Appellant is Bound by Its Purchase at Foreclosure Sale in 1915.

On July 2, 1924, the Cincinnati, Indianapolis and Western Railroad Company filed in the District Court below the petition which is involved in the case at bar (R. 2-11). That petition recites briefly the history of the prior litigation and then alleges that until the decision of this court denying certiorari on May 1, 1922, the petitioner "did not know its rights and obligations arising from its said election and the decrees," and that, had it been aware of the results which would follow the so-called election, it would have rejected all of the obligations of its predecessors (R. 10). The prayer of the petition is that the appellees in this court "be required to show cause, if any, why your petitioner should not be permitted to rescind its acceptance of the said contract and that such rescission be ordered and that it be permitted to cancel all of the obligations arising under said contract or contracts of September 20, 1883. * * * and that the foreclosure decree in this case be modified to the extent necessary" and that petitioner have "such further relief as the equity of the case may require and as may seem meet."

To this petition the appellees addressed a joint and several motion to dismiss, on the ground of want of jurisdiction and, alternatively, on the grounds that the petition did not state a valid cause of action in equity, that the opportunity of petitioner to exercise its rights, if any, to change the elec-

tion or to modify the foreclosure decree was exhausted by the prior proceedings in the District Court and on appeal, that the alleged mistakes from the consequences of which petitioner asked relief were mistakes of law only and not of fact, and that petitioner had been guilty of laches depriving it of the right to relief prayed for or to any relief in equity (R. 13). After oral argument on the motion, the District Court handed down a written opinion (R. 33-42), the gist of the ruling of said court being stated in the conclusion of said opinion (R. 42) as follows:

> "For the reasons stated, we are constrained to the opinion that the petitioner is not entitled to relief in these actions upon the ground of the mistake alleged, nor, if the petitions were amended so as to aver the mistake immediately subsequent to May, 1922, the ignorance of the existence of a right to then prosecute such action, could the court entertain such bill as supplementary and ancillary to these cases, for want of jurisdiction."

Thereupon petitioner obtained leave of court to file, and did file, an amendment to its petition (R. 42-43). The amendment states (R. 43-44): That shortly after May 1, 1922, the petitioner "called to the attention of the Indianapolis Union Railway Company the amount of the over-payment based on use for the period January 1, 1916, to May 31, 1922, inclusive, with petitioner paying two-thirteenths rental" and requested that it (petitioner) be relieved of the same in the future; that "petitioner never intended to acquiesce and did not acquiesce in the decision requiring it to pay two-thirteenths of the rental contrary to its expressed intention not to do so by the written election filed herein, and petitioner attempted in various ways, for a reasonable time, to be relieved of such obligation without recourse to law;" that in September, 1923, petitioner's then president "who had made the aforesaid re-

monstrances and efforts to be relieved" from said contract, resigned and a new president was not appointed until December 1, 1923; and that "when petitioner ascertained that it could get no relief without resort to court action it expressly made all payments under protest and began preparation for relief through the courts."

To this petition as amended, the appellees addressed a joint and several motion to dismiss, upon the same grounds as taken in the motion to dismiss the original petition (R. 44-45). Thereupon the District Court handed down a second written opinion (R. 45-49), holding that the controversy between the parties is "founded upon a contract as definitely and distinctly entered into as if it had been made by document altogether independent of the foreclosure," that such controversy is not ancillary to the foreclosure suit, and therefore that the amended petition must be dismissed for want of jurisdiction. There was a decree accordingly (R. 49), from which this appeal is taken.

ARGUMENT.

The District Court did not Err in Dismissing the Amended Petition for Want of Jurisdiction.

The District Court dismissed the appellant's petition, as amended, for want of jurisdiction, thereby holding that the relief which appellant sought, viz.: relief from an accepted contract, was in no sense ancillary to the original foreclosure proceedings. There was error in the decree if, and only if, the relief sought by appellant was not relief from an accepted and binding contract. That such was the relief sought by appellant is conclusively demonstrated by an analysis of the facts in the record. Such contract became in all respects valid and binding on appellant either (a) on December 30, 1915, the day on or before which the purchaser at the foreclosure

sale was required by the foreclosure decree to file a written election not to adopt the contract, or (b) on May 31, 1922, being thirty days after this court terminated the prior litigation by refusing certiorari, or (c) within a reasonable time after May 1, 1922, the day that this court denied the writ of certiorari in the prior litigation. For the purposes of the case at bar, it is immaterial which of these three views is taken as to the time when such contract became binding on appellant. In our opinion the first view is logically the correct one. The District Court preferred the second or the third view. But the vital point is that such contract became valid and binding on appellant long prior to July 2, 1924, the date on which appellant filed its petition in the lower court in the case at bar; and this being true, it follows inevitably that the controversy raised by said petition was not within the jurisdiction of the trial court, since no federal question was presented by the petition and there was not the requisite diversity of citizenship between the parties and the relief sought was not in any way ancillary to the original proceedings in foreclosure.

An Executed Contract of Sale by a Receiver to a Purchaser at Receiver's Sale Stands on the Same Footing as an Executed Contract Between Private Persons.

In the course of the proceedings instituted by the appellees herein in the District Court on October 24, 1916 (R. 53), it was conclusively adjudicated in the District Court and in the Circuit Court of Appeals, that the appellant herein, by virtue of the decree in the foreclosure suit and appellant's conduct pursuant to the provisions of that decree, accepted the contract of its predecessor, the Cincinnati, Indianapolis and Western Railway Company, with the Indianapolis Union Railway Company and became (and therefore now is) bound to perform that contract and to pay in full the two shares of fixed rental

paid by its said predecessor. This obligation of the appellant is, under the authorities, as complete and binding an obligation as any obligation arising out of a contract executed between two private parties. It has been repeatedly held that a sale or contract made by an order of court creates, when confirmed by the court, precisely the same situation as is created by a sale or contract between private persons. One of the leading cases is *Files v. Brown*, 124 Fed. 133 (C. C. A., 8th Circuit). In that case, a receiver had sold to Files, for $25.00, a judgment for several thousand dollars. The receiver discovered, after the sale had been made and confirmed, that the judgment was probably worth a great deal more than $25.00, and he sued to have the contract of sale set aside. The lower court set the contract aside, but its action was reversed on appeal, the Circuit Court of Appeals saying:

> "The Court and its receiver had no higher right than any private vendor to undo their contract and to take from the vendee the property which he had purchased. * * * The question is, what facts are here averred which would entitle *a private citizen* to relief of this nature if he had accepted the offer of appellant." (Our italics.)

A few years later, in *Morrison v. Burnette*, 154 Fed. 617, the same court had before it a case in which a lease, made and confirmed by an order of the District Court, had later been set aside by the court because a higher bid for such lease had come in subsequent to the sale. The Circuit Court of Appeals again reversed the District Court and held that after the order of confirmation made by the District Court the rights of the parties were vested and nothing would warrant the court in setting aside the contract but fraud, deceit, or mistake, *for which equity would avoid a like contract between private parties.*

To the same effect see:

In re Burr Mfg. & Supply Co., 217 Fed. 16, (C. C. of Appeals, 2nd Circuit);
Earle v. McCartney, 112 Fed. 372, affirmed in 115 Fed. 462;
Cropper v. Brown, 76 N. J. Eq. 406, 74 Atl. 987.

A strong case on the same point is *Hayward v. Wemple*, 136 N. Y. Supp. 625, affirmed in 206 N. Y. 692, 99 N. E. 1108. There a purchaser of real estate at a judicial sale asked to be released from his agreement on the ground that he had mistakenly supposed that the mortgage on the real estate would not attach to it in his hands. The court said that the purchaser was simply attempting to rescind the contract made by the acceptance of his bid and that rescission could only be had under such circumstances as would justify it *between private parties.*

The same rule is laid down in *Koegel v. Koegel*, 83 N. J. Eq. 179, 89 Atl. 861.

As Mr. Justice Brewer said, speaking for the court in *Pewabic Mining Co. v. Mason*, 145 U. S. 356, "the purpose of the law is that the (judicial) sale shall be final," and it follows that when the sale has been made and confirmed, courts see no difference between the contract thereby created and a contract made entirely out of court, and apply the same rules to the one as to the other when questions of rescission, reformation or similar relief are involved and the jurisdiction of the court to grant such relief is in issue. A contract made under and pursuant to judicial proceedings is like any other contract; and a federal court, therefore, will take jurisdiction of questions arising under that contract if, and only if, it would take jurisdiction of similar questions arising under a contract executed in the ordinary way, i. e. if there is the requisite diversity of citizenship between the contending parties or if a federal question is involved. In the case at bar there is admittedly neither a federal question nor the requisite diversity of citizenship (R., 35-36).

Appellant's Petition is Simply a Suit Seeking Rescission of Appellant's Accepted Contract with the Indianapolis Union Railway Company. Of Such a Suit the District Court has no Jurisdiction.

Tested by these principles, did the lower court in the case at bar have jurisdiction of appellant's petition? We submit that it clearly did not. In June, 1915, that court (the United States District Court for the Southern District of Ohio, Western Division) by its decree of foreclosure ordered sold all of the properties of the Cincinnati, Indianapolis and Western Railway Company, including specifically the contract of September 20, 1883, between said company and The Indianapolis Union Railway Company. The appellant herein, The Cincinnati, Indianapolis and Western Railroad Company, purchased those properties, *including that contract.* (Actually appellant's assignor made the purchase, but appellant of course stands in the shoes of its assignor, and it will be simpler to discuss the case as though appellant had been the purchaser in the first instance.) The District Court then confirmed the sale to appellant. What was then the situation with respect to the appellant's relation to the contract here involved? It was this: Appellant had accepted that contract and was bound by it, subject only to its right, within 30 days after the date of the deed from the Master to appellant, to reject the contract. Appellant had only one course to pursue if it did not want the contract, viz: to reject it within 30 days from the date of the deed, i. e. on or before December 30, 1915. If appellant did not so reject the contract on or before December 30, 1915, its purchase of the contract—and therefore of course its acceptance thereof—became absolutely final. In other words, on December 31, 1915, if appellant had not before that date rejected the contract, appellant was as completely bound thereon, and so was the Indianapolis Union Railway Company, as though appellant and the Indianapolis Union

Railway Company had affixed their signatures thereto on that date. We repeat that it took *no affirmative action* on the part of appellant, after the delivery of the Master's deed, to accept the contract; the contract was already accepted, subject only to appellant's right to nullify the acceptance on or before December 30, 1915; and on and after December 31, 1915, the appellant's acceptance of the contract was complete, final, and indefeasible. Before December 31, 1915, however, appellant in effect said to the District Court: "I accept *all* the benefits of said contract of September 20, 1883, with The Indianapolis Union Railway Company, but I reject one-half the burdens thereof." Appellant was bound to know, as the District Court and the Circuit Court of Appeals have expressly held, that the District Court's foreclosure decree did not contemplate or permit any such action by appellant—that appellant had to reject the contract *in toto* before December 31, 1915, or on that day appellant would be automatically bound to perform the contract *in toto*. There is, as the Circuit Court of Appeals says in its opinion (R., 117), no suggestion in the record that appellant ever contemplated making the only rejection that was allowed by the decree, viz: rejection *in toto;* on the contrary, all of the inferences in the record are to the contrary (279 Fed. 356, 365). It follows, then, that since December 31, 1915, appellant and The Indianapolis Union Railway Company have both been completely bound by said contract of September 20, 1883. From the obligations of that contract appellant can be relieved on the same grounds, and no others, that equity will decree a rescission of any contract between private parties. The case before the court stands, therefore, as a simple suit by appellant to rescind in equity a contract upon which appellant has been completely bound since December 31, 1915.

Appellant's Petition Seeks Rescission of an Accepted Contract, not Modification of the District Court's Decree of Foreclosure.

We submit that from whatever angle the matter be viewed and however the question be phrased, there is on analysis no escape from the foregoing conclusion. It will not do to say that appellant's petition asks the District Court to modify its foreclosure decree—a power which that court admittedly has and could exercise in any proper ancillary proceeding. It is true that appellant's petition, after praying that appellant be permitted to rescind said contract, and cancel all of its obligations thereunder, also prays that the foreclosure decree "be modified to the extent necessary;" but what modification of the decree is in fact sought by appellant's petition? Indeed, what modification of the decree could the District Court have made on said petition? The plain fact is that no modification is sought. It is *relief from an accepted contract, not modification of a decree,* that appellant desires. The foreclosure decree of the District Court could be modified a dozen times and appellant would gain nothing thereby. By the same token, the appellant if entitled to any relief on the merits of its case (which we deny) could get in a proper court all the relief it seeks without any modification whatever of the foreclosure decree. If the question be thus tested by considering how a decree modify the foreclosure decree could be drawn to give appellant the relief which it wants, it becomes evident that appellant's desires could not be satisfied by any such modifying decree; they could be satisfied only by a decree rescinding the contract between appellant and the Indianapolis Union Railway Company. Such a decree could only be rendered in an original suit—a suit *de novo*—of which suit the District Court would have jurisdiction only if there were the requisite diversity of citizenship.

APPELLANT'S PETITION SEEKS RESCISSION OF AN ACCEPTED CONTRACT, NOT RESCISSION OF APPELLANT'S ELECTION.

Nor does it advance appellant's case to say that what appellant's petition sought was a rescission of its election. Appellant bought the contract of September 20, 1883, along with the other properties of its predecessor, in November, 1915, and received from the Master an instrument transferring that contract to it. It filed a purported election, in which it sought to retain all the benefits of that contract and reject one-half of its burdens, on December 24, 1915. If appellant were now permitted to "rescind" that election, what would be the result? The appellant would gain nothing thereby. The purported election would be out of the way, but appellant's contract with The Indianapolis Union Railway Company would not be, because that contract was on December 31, 1915, automatically and without any election, absolutely binding on appellant. The situation before the court is not as though appellant had been required by the foreclosure decree expressly to accept the contract with The Indianapolis Union Railway Company and had filed its election so to do, which election it now seeks to rescind. No election to accept was necessary; final acceptance was automatic on December 31, 1915. Thus analyzed, it is seen that what appellant's petition seeks is not the rescission of its purported election, but the *rescission of its contract* with the Indianapolis Union Railway Company. Indeed, the appellant's petition states that rescission of its contract with the Indianapolis Union Railway Company is the relief sought. The prayer of the petition is that appellant "be permitted to *rescind its acceptance* of the said contract and that such rescission be ordered and that it (appellant) be permitted to *cancel all of the obligations* arising under said contract." Appellant can get this relief, if at all, only in a new suit before a court having original jurisdiction of all the parties to the controversy.

THE ACCEPTED CONTRACT WHICH APPELLANT SEEKS TO RESCIND HAS BEEN BINDING ON APPELLANT SINCE DECEMBER 31, 1915, OR—AT THE VERY LATEST—SINCE MAY 31, 1922.

We submit, therefore, upon the foregoing argument, that appellant has been bound on the contract of September 20, 1883, with The Indianapolis Union Railway Company since December 31, 1915. But if the view be taken that appellant was not bound on said contract until thirty days, or a reasonable time, after appellant knew from the courts exactly what its rights and obligations were, the result in the instant case is the same. The final decree of the District Court in the prior litigation was rendered on December 17, 1920 (R., 103-104) and on July 6, 1920, that court entered a decree which completely advised appellant of the court's holding on the extent of its rights (R., 101-103). While the appellant of course had the right to appeal, as it did, in the prior litigation, still the orders and decrees of the District Court were at least *prima facie* correct, and therefore, in the situation in which appellant then found itself, appellant should be held to have known what its rights were on July 6, 1920, or at most, on December 17, 1920. And appellant took no action whatsoever by way of rejecting the contract with the Indianapolis Union Railway Company within thirty days, or a reasonable time, after either July 6, 1920, or December 17, 1920. Nor did appellant take any action whatever by way of rejecting said contract within thirty days, or a reasonable time, after February 7, 1922, the date on which the Circuit Court of Appeals affirmed the decree of the District Court in the prior litigation (R., 109-118). Nor—coming to the very latest date that can possibly be taken—did appellant take any action whatever by way of rejecting said contract within thirty days, or a reasonable time, after May 1, 1922, the date on which this court denied appellant's petition for a writ of certiorari (258 U. S. 629). Certainly

appellant knew precisely what its obligations were on May 1, 1922. It did not file the present petition until July 2, 1924. And during all of the interval between May 1, 1922, and July 2, 1924, it "continued to use the terminal facilities of The Indianapolis Union Railway Company and to pay the fixed rental established under the prior decisions upon the point" (R., 35), that is to say, two shares, or two-thirteenths, of said fixed rental, pursuant to the contract obligations of its predecessor under said contract of September 20, 1883. That such conduct and appellant's failure to take any steps toward rejecting said contract, not only on or before May 31, 1922, but during the entire period from May 1, 1922, to July 2, 1924, bound appellant to said contract (even if it was not so bound on December 31, 1915, which we think it was) seems too clear for argument. As the District Court said (R., 47-48);

> "A renewed contract relation came into existence through the purchase at foreclosure in 1915 and the inaction of the petitioner (appellant) in 1922. The only right given by the decree was to reject within the short period allowed. The petitioner was advised in 1922 that it must reject both contracts or neither. It saw fit not to reject both. It therefore became bound by both * * * Promptness in declaring rejection of the contracts was a condition precedent to the very existence of the right of rejection. The right is not now unenforceable by reason of any waiver or acquiesence in the sense of estoppel, but the right to reject has ceased to exist by reason of breach of the condition precedent that it be promptly asserted. The right given was not of election in the sense of the necessity of definite action either to accept or reject, but was really an option to reject, which option has expired."

Such option to reject expired, at the very latest, on May 31, 1922, or within a reasonable time after May 1, 1922, and thereupon said contract was absolutely binding on appellant.

The appellant's petition seeks relief from and recission of that contract. If appellant is entitled to that relief at all, on the merits (which we firmly believe it is not) it can get such relief only in a court having jurisdiction of the parties. The question of whether or not such relief should be granted involves, as the District Court pointed out, "no question of construction, interpretation, modification or enforcement of the foreclosure decree. It is a controversy existing between the parties founded upon a contract as definitely and distinctly entered into as if it had been made by document altogether independent of the foreclosure. It is not to be considered as ancillary to the foreclosure suit." The decree of dismissal for want of jurisdiction was therefore clearly correct.

COMMENTS ON APPELLANT'S BRIEF.

We wish first to mention briefly some of the several statements in appellant's brief which we believe are inacurate.

It is stated in several places in appellant's brief that appellant's petition filed in the District Court on July 2, 1924, sought "to rescind its election." This phraseology is unjustified. As we have shown above, an analysis of the petition shows that what appellant sought was relief from and rescission of its accepted contract with the Indianapolis Union Railway Company; and the prayer of the petition itself so states.

It is stated on page 25 of appellant's brief that the amendment to appellant's petition "alleges that appellant gave notice to appellees of its intention to rescind." We find no such allegation in the amendment. Nor do we find in the amendment or elsewhere in the record any support for the statement on page 28 of appellant's brief that "appellees were put on notice that such suit (to rescind) would be brought if other efforts failed."

We distinctly disagree with the statements on pages 11, 12, 17 and 21 of appellant's brief that the District Court in its first opinion held that it had jurisdiction to entertain the petition and that it decided all matters raised by the motion to dismiss, "including the question of jurisdiction, in favor of appellant, but held that the petition should be dismissed on the ground of waiver and acquiesence." A reading of the District Court's first opinion will show that the court really took the same grounds for his conclusion in that opinion as he took in the second opinion, the opinion upon the motion to dismiss the petition as amended. The reasoning of the court (R. 41-42) is that appellant's conduct in using the terminal facilities of the Indianapolis Union Railway Company and paying the full two shares of rental therefor from May 1, 1922, forward, and in failing to take any action with respect to rejecting the contract, completely bound appellant to that contract; that in this situation "the granting of the relief prayed for in no way involves a construction of the original foreclosure decree nor the construction to be given to any act thereunder;" and therefore that the court had no jurisdiction. This same reasoning is stated completely and clearly in the second opinion. There is, therefore, no justification for the statement on page 18 of appellant's brief that the District Court "changed its opinion on the question of jurisdiction," nor for the statement on page 26 of appellant's brief inferring that the District Court indicated in the second opinion that he had "lost jurisdiction." Other similar erroneous statements in appellant's brief might be specified, but we refrain from extending this brief by so doing.

Appellant has appealed from the decree of the District Court dismissing the petition, as amended, for want of jurisdiction, and the question before this court is whether that decree was right or wrong, and not whether the lower court in some particulars employed words or ideas which might have

been improved upon. For this reason we do not deem it necessary to enter into a long discussion of each sentence of the trial court's two opinions; and for the same reason we refrain from any comment on the merits of the case and on that part of the trial court's first opinion which deals with the merits.

So far as the cases cited by appellant are concerned, it only needs to be said that they are obviously inapplicable to the issue in the case at bar. Of course appellees have no quarrel with the rule laid down by the Circuit Court of Appeals in the prior litigation (279 Fed. 356, 362) and enunciated in the other cases cited by appellant, to the effect that "a bill in equity dependent upon a former suit * * * may be maintained * * * to restrain, avoid, explain or enforce the judgment or decree therein;" but these cases are no authority for sustaining the jurisdiction of the District Court in the instant case, in which appellant seeks, not construction, explanation or enforcement of the District Court's foreclosure decree, but rescission of appellant's accepted contract with the Indianapolis Union Railway Company.

Appellant's argument is addressed to what appellant conceives to have been the reasoning of the trial court, and not to the decree which the trial court made. Further, appellant misunderstands the District Court's reasoning. Appellent assumes that the District Court "barred relief on the ground of waiver or acquiesence" and then proceeds to a discussion of the doctrine of waiver and acquiesence. Of course the District Court did not simply say, as appellant would have it appear: "There was waiver and acquiesence by appellant; therefore I have no jurisdiction." What he said was that the appellant's conduct from May 1, 1922, on, in using the terminal facilities of the Indianapolis Union Railway Company, in paying two shares of fixed rental for such use, and in failing to take any steps to reject the contract, amounted to and was an

acceptance of the contract and therefore that the relief sought by appellant, viz.: the rescission of such accepted contract, was in no way ancillary to the original foreclosure suit.

The appellant's contention that the amendment to the petition helps appellant's case is decisively answered in the trial court's opinion (R. 46). As the court there points out, neither the amendment nor the original petition avers that the appellant at any time asserted "any right, now asserted, to be relieved of all contractual obligations with the Indianapolis Union Railway Company or to surrender the benefit of such contract or to cease the use of the terminal facilities afforded thereunder. From all that appears, the purpose of the petitioner was to retain the use of the terminal facilities but to secure a reduction of the rental to be paid from two-thirteenths of the fixed rental to one-twelfth thereof." Manifestly, such a purpose, far from showing that appellant had not accepted the contract, proves just the reverse, that appellant was bound by the contract.

Upon the foregoing considerations we submit that the District Court's decree dismissing the appellant's petition as amended, for want of jurisdiction, was clearly correct and should be affirmed.

Respectfully submitted,

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